IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1227 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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KADVAJI UDAJI THAKORE - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MS HINA DESAI for the Appellant
MR AJ DESAI,ADDL. PUBLIC PROSECUTOR for the Opponent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 15/01/2007

ORAL JUDGMENT

1. Heard Ms. Hina Desai, for the appellant and Mr. A.J.Desai, learned Additional Public Prosecutor for the State.

2. The present appeal is filed under Section 374 read with Section 386 of Criminal Procedure Code, against the order dated 29th October, 2002 of conviction and sentence passed by the learned Additional Special Judge, Banaskantha at Deesa in Special Case No. 33 of 2002, whereby the learned Judge held accused guilty of charges of offence punishable under Section 8(c) read with Section 20(b) (ii) (B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as “the Act” for short). The learned Judge, after recording conviction and hearing the accused on the quantum of punishment, imposed five years rigorous imprisonment and fine of Rs.30,000/- (Rupees Thirty Thousand only) and directed the accused to undergo rigorous imprisonment for 1 (one) year, in the event of default in paying the amount of fine.

3. The judgment and order of conviction and sentence dated 29th October, 2002 has been assailed on various grounds by the learned Counsel Ms. Hina Desai, and she has taken this Court through oral and documentary evidence led during the course of trial including *panchnama* of seizure of *muddamal Ganja*, which was allegedly carried by the accused at the relevant point of time on the date of incident i.e. 22/01/2002 at about

20.15 Hrs.

4. After some deliberation, Ms. Hina Desai has fairly accepted that she will not press the appeal *qua* order of conviction recorded by the learned Trial Judge, but her anxiety is that the substantive sentence imposed by the learned Trial Judge including amount of fine should be held to be harsh and unwarranted, in light of two factors; one that the substance allegedly found in possession of the accused was Ganja and the same cannot be equated with other psychotropic substance or drugs; and two while deciding the quantum of punishment, the learned Trial Judge ought to have considered this aspect in correct perspective and the punishment should have been comparatively lesser, when the accused is held guilty for holding prohibitive substance like Ganja, opium or hemp (Bhang). Charas and other substance like Brown Sugar etc. are dangerous and possession of large quantity of such material only would invite harsh punishment beyond 3 to 5 years.

5. Ms. Desai, learned Advocate, has not challenged the legality and validity of the conviction recorded by the learned Trial Judge. She has submitted that when the learned trial Judge has recorded in the last operative portion that the accused is poor man and the quantity of

Ganja found in the gunny bag carried by him was not actual flowering tops of Cannabis and that; it was not possible for the learned Trial Judge even after recording the evidence of the Seizing Officer that total stock seized was more than 3 kg, then the learned Trial Judge could have imposed lighter punishment than imposed in the present case.

6. It is submitted that the accused has practically passed the entire period of substantive punishment imposed in the jail and it is not possible for the accused to pay amount of fine; he shall have to remain in jail for a period of one year, therefore, this Court should reduce the substantive sentence to three years and amount of fine to Rs. 15,000/- (Rupees Fifteen Thousand only), so that the accused can be released and serve his family at the earliest. Today, Ms. Desai, learned Advocate has tendered one xerox copy of letter addressed to the Section Officer, High Court Legal Services Committee by the Superintendent, Sub-Jail, Mahesana and according to him the information is that the amount of fine has not been paid by the accused till date. The statement recorded by the Jailor of the convict – appellant dated 12/01/2007 (Xerox copy) has been shown to the Court. It is not possible for this Court to accept

contents of the convict – accused because a person in prison can claim anything, so that he can have some favour from the Court. Of course, the papers tendered by Ms. Desai, learned Advocate is taken on record.

7. There are no reasons for the Seizing Officer to implicate the accused in crime where the quantity of Ganja was less than 1 kg. Ultimately the Officer was to draw *panchnama* in accordance with the material found from the Polythene gunny bag carried by the accused and therefore, he has fairly accepted that the total material in the gunny bag was of more than 3 Kg. Value of the material was assessed at Rs. 8,000/. It would not be possible for the Court to say that the actual substance seized can be said to be Ganja as defined in the N.D.P.S. Act, and that it was less than 1 kg because no specific suggestion was made to the Seizing Officer or any initial circumstances had emerged from the evidence under which the Trial Court could have held that actual Ganja including leaves and other parts of the plant was less than 1 Kg. The learned Trial Judge is found justified in saying that the Ganja seized from the accused was more than small quantity but less than commercial quantity.

8. Having considered the reasons assigned by the

learned Trial Judge for deciding the quantum of punishment, it is possible for the Court to accept the say of Ms. Desai, learned Advocate that the learned Trial Judge ought to have said that the quantity allegedly found from the accused is much less than the commercial quantity and in such situation substantive sentence could have been imposed accordingly.

9. The Court had good sound reasons for deciding the quantum of punishment. When the Court decides to impose rigorous imprisonment of five years in a case where the prohibited substance i.e. Ganja worth 3 Kg and 200 gms. is seized during the search including leaves and other parts of plant, then atleast amount of fine imposed should not be very harsh so that the accused shall have to remain in jail on account of non-payment of fine, in default, as it has direct relation to amount of fine imposed.

10. Mr. A.J.Desai, learned Additional Public Prosecutor, while arguing on quantum of punishment has strongly resisted the submission that it would not be legal and proper to reduce the substantive sentence made by the learned Trial Judge, merely because the accused has undergone the period of sentence imposed on him.

11. This Court can take some liberal view *qua* amount of fine in the background of one crucial fact that he has undergone substantive sentence of five years of conviction. Poverty is not a ground for reducing the substantive sentence imposed, but the economic strength of the accused obviously has relevance in deciding the amount of fine and the activity in which the accused is involved. At the relevant point of time, the accused was working as an agricultural worker. In such a situation, if the amount of fine is reduced to Rs.15,000/- (Rupees Fifteen Thousand only) from Rs.30,000/- (Rupees Thirty Thousand only), and in default, six months of rigorous imprisonment instead of one year, it would meet the ends of justice.

12. Having considered the totality and nature of evidence available on record, and fair submissions made by Mr. Desai, learned Additional Public Prosecutor, this Court is in agreement with him that, the substantive sentence imposed by the learned trial Court cannot be reduced, but the amount of fine can be reduced and accordingly, it is reduced to Rs. 15,000/- (Rupees Fifteen Thousand only) and in default, to undergo rigorous imprisonment for a period of six months.

13. Ms. Hina Desai, learned Advocate submitted that if the amount of fine is reduced to Rs.15,000/- (Rupees Fifteen Thousand only) and if the accused is directed to undergo six months imprisonment, in default of payment of fine, in such a situation, the accused may try to pay the fine, otherwise he shall undergo punishment.

14. For the aforesaid reasons, the appeal is partly allowed. The impugned judgment and order dated 29th October, 2002 of conviction passed by the learned Special Judge, Banaskantha at Deesa in Sessions Case No. 33 of 2002, and sentence of five years imposed to the accused for the offences punishable under Section 8(c) read with Section 20(b) (ii) (B) of N.D.P.S. Act, is upheld. However, the sentence of fine is reduced to Rs.15,000/- (Rupees Fifteen Thousand only) from Rs.30,000/- (Rupees Thirty Thousand only) and the accused is directed to undergo rigorous imprisonment for 6 (six) months instead of 1 (one) year, in default, of payment of fine. Order and direction accordingly.

[C.K.Buch, J.]

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